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Docket No. 79-1977

In the Supreme Court of the United States

October Term, 1980

FREDERICO RODRIGUEZ,
Petitioner,

vs.

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P.N.,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF FREDERICO RODRIGUEZ, PETITIONER,

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

CONSENT OF PARTIES

Pursuant to Rule 36 of the U. S. Supreme Court Rules, this Brief Amicus Curiae is being filed with the written consent of all parties to the case, copies of which are being separately filed with the Court.

STATEMENT OF INTEREST

This Brief Amicus Curiae is being submitted by the Admiralty Law Section of The Association of Trial Lawyers of America, a national Bar Association consisting of more than 40,000 lawyers who primarily represent plaintiffs in personal injury and death litigation and workmen's compensation. The Admiralty Law Section includes most of the attorneys throughout the United States who specialize in Maritime Personal Injury Law.

The pending case is of great importance and will decide the maritime law on the question presented. It will affect the welfare of many plaintiffs in maritime cases now pending throughout the United States.

We believe that based on our research and analysis of the law and our experience in the maritime law and the interests of safety of workmen on board vessels, that our brief argument will be of assistance to the Court.

Our Brief will be limited to the following questions presented without any reference or review of the facts.

QUESTIONS PRESENTED

1. When there is a statutory assignment under 33 U.S.C. §933(b) of a longshoreman's right to sue a negligent third party, and the employer fails to prosecute the third party claim, does the longshoreman retain the

right to sue in his own name?

2. Where there is a conflict of interest between the longshoreman and the employer, and the employer fails to sue a negligent third party, may the longshoreman bring such a suit in his own name even after six months after an award in a compensation order?

3. Is there an "award in a compensation order filed by the Deputy Commissioner or Board" so as to trigger the assignment provision of 33 U.S.C. §933(b) by the mere acceptance of compensation without action by the Deputy Commissioner?

SUMMARY OF ARGUMENT

1. The Longshoremen's and Harbor Workers' Compensation Act, which is to be liberally construed in favor of the injured employee and which intends to place the burden on the company causing the employee's injury, should be construed to permit longshoremen to sue negligent third parties even more than six months after an award of compensation, where the employer does not bring the action. Such a rule serves the Congressional intent to foster safety in maritime employment.

2. Where there is a conflict of interest between employer and employee, the Czaplicki case provides an exception to the assignment provision of the Longshoremen's Act. Similarly, where employers decline to sue their business customers, the vessel owners, the long-

shoreman should be able to sue. In recognition of this "business decision" not to sue vessel owners, the Court should recognize that employers may reassign the right to sue back to the longshoreman or otherwise waive the assignment provision, so the longshoreman may maintain an action.

3. Where there is no action by the Deputy Commissioner, there is no "award in a compensation order filed by the Deputy Commissioner" so as to trigger the statutory assignment. Some action by the Deputy Commissioner is necessary, beyond a longshoreman's mere acceptance of compensation and beyond preparation of papers by claims examiners in the Labor Department. Since the Deputy Commissioner did not act, there has been no assignment in the cases before the Court.

ARGUMENT

1. WHEN THERE IS A STATUTORY ASSIGNMENT UNDER 33 U.S.C. §933(b) OF A LONGSHOREMAN'S RIGHT TO SUE A NEGLIGENT THIRD PARTY, AND THE EMPLOYER FAILS TO PROSECUTE THE THIRD PARTY ACTION, THE LONGSHOREMAN RETAINS THE RIGHT TO SUE IN HIS OWN NAME.

The Longshoremen's and Harbor Workers' Compensation Act provides in §33(b) that:

> "acceptance of such compensation under an award in a compensation order filed by the Deputy Commissioner or Board shall operate as

> an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award."

In approaching the issues posed by these consolidated appeals this Court's analysis must begin with the well established principle that the Longshoremen's and Harbor Workers' Compensation Act is to be liberally construed in favor of injured employees. Northeast Marine Terminal Co., Inc., v. Caputo, 432 U.S. 249 (1977); Voris v. Eikel, 346 U.S. 328 (1953). A narrow statutory construction should not deprive the injured employee of either his compensation or his claim in damages against third parties. Potomac Electric Power Co. v. Wynn, 343 F.2d 295 (D.C. Cir. 1965); Lindler v. District of Columbia, 502 F.2d 495, 499 (D.C. Cir. 1974).

Considerations of policy favor a rule which permits suits by longshoremen against negligent third party. It is one of the objectives of the Longshoremen's Act to place "the burden ultimately on the company whose default caused the injury." Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Company, 376 U.S. 315, 324 (1964); Caldwell v. Ogden Sea Transport Inc., 618 F.2d 1037 (4th Cir. 1980).

Permitting negligence actions against vessel owners by longshoreman for more than the six month period will foster the increased safety in maritime employment which was desired by Congress. Increased safety is fostered because vessel owners will be encouraged to remedy dangerous conditions on board their vessels in order to avoid facing suits by longshoremen who suffer injury. The legislative history of the 1972 Amendments to the Longshoremen's Act indicates that the overriding purpose of the Amendments was to create incentives for safety in the nation's second most dangerous profession. Johnson v. A/S Ivarans Rederi, 613 F.2d 334 (1st Cir. 1980). The following language from the House report is instructive:

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." H.Rep. No. 92-1441, 92nd Cong., 1st Sess.

It is also useful to consider the purpose of the assignment provision contained in the Longshoremen's Act.

"The concept underlying third party actions is the moral idea that the ultimate loss from wrong doing should fall upon the wrong doer. ... So, it is elementary that if a stranger's negligence was the cause of injury to claimant in the course of employment, the stranger should not be in any degree absolved of his normal obligation to pay damages for such an injury." Larson, The Law of Workmen's Compensation (1976), §71.10. The courts have applied this view when interpreting the assignment provision of the Act, concluding that the purpose of that section is to protect the employer's rights. In The Etna, 138 F.2d 37, 40 (3rd Cir. 1943), the Court said:

> "The reason for the assignment which the law thus afforded is apparent. An injured employee, especially once he has received compensation, may have neither the incentive nor the desire to press his right of action against the third persons responsible for his injury. Hence, the law passed to the employer the control of the employee's right of action against third persons once the employee accepted compensation."
>
> "The third party tort fessor was not the party sought to be protected by this provision of the Act and is given no ground thereunder to say which of two persons who may be entitled under the law

> to maintain an action against him may do so, except to the extent that he is entitled to protection against being exposed to action by both." The Owen, 43 F.Supp. 897 (E.D. Pa. 1942). See also Roeben v. United States, 113 F.Supp. 732, 734-35 (D.N.J. 1953).

The purpose of §933 then is not to relieve third party tort feasor of the responsibility or wrongful acts injuring employees. Public policy as contained in the Longshoremen's Act is to require payment by wrongdoers for their wrongful conduct against workers. It is within this context that courts have permitted longshoremen to sue third parties more than six months after a compensation award, the assignment provision of the Act notwithstanding.

In Potomac Electric Power Co., v. Wynn, supra, the Court of Appeals for the District of Columbia focused upon the fact that the Longshoremen's Act assignment provision is not designed to protect third parties from suit. The purpose of the assignment provision is only to safeguard the employer's right to recoup his compensation payment. Therefore the Court concluded that the employer's declination to sue amounts to a waiver of the protection afforded by the statutory assignment. The Court reasoned that since the employer had not instituted suit or secured a compromise of the claim against the negligent third party within a reasonable time after the statutory assignment to

him, the Court would permit the injured worker to bring suit in his own name within the period of the statute of limitations. The Court reasoned that the Longshoremen's Act provided that the employer could either institute proceedings or compromise with the third person but the Act did not permit the employer to abandon the action entirely. The same rule continues to be followed by the District of Columbia Circuit. See Joyner v. F and B Enterprises, Inc., 448 F.2d 1185 (D.C. Cir. 1971), where the Court declared, "It is settled that an injured employee may bring suit against a third party whenever it is evident that the employer-assignee for whatever reason does not intend to bring suit." Id. at 1187. See also Lindler v. District of Columbia, supra.

Other courts have also approved such an approach to the question of whether the longshoreman may maintain his own action after the six month time period. See Clark v. Hutchison, 161 F.Supp. 35 (D.C. Canal Zone 1957), where the Court viewed the right to sue as a concurrent right shared by the longshoreman and the employer. See also Castro v. United States, 230 F.Supp. 967 (D.P.R. 1964), where the longshoreman was permitted to file suit against the United States more than six months after an award of compensation because no third party suit had been filed by the employer and the statute of limitations had almost run on the claim.

Accordingly, the Court of Appeals for the Fourth Circuit in Caldwell v.

Ogden Sea Transport Inc., supra, concluded that the right to action against third parties may be re-vested in the longshoreman when it becomes manifest that the assignee (employer) with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason. This view is in keeping with the requirement that the Act be liberally construed in favor of employees and in keeping with the congressional intent to foster safety on the water front. This Court should refuse to divest the longshoreman of his right to sue where the employer, despite assignment, remains inactive and leaves the right to sue lying idle.

This conclusion is further buttressed by the provisions of Rule 17(a) of The Federal Rules of Civil Procedure. The Rule requires that every action be prosecuted in the name of the real party in interest. Under §33(e) of the Longshoremen's Act, any recovery made by the employer shall be distributed according to a statutory scheme. The employer retains one fifth of the excess of any recovery over the compensation lien and the expenses of suit. The remainder of any recovery belongs to the injured employee. Thus the longshoreman clearly retains an interest in the outcome of the suit even when it is brought by the employer. This real interest remaining in the employee even after the statutory assignment should be sufficient to entitle the longshoreman to continue his participation in the suit. Clark v. Hutchinson, supra.

The ruling in PEPCO, supra, largely followed in Caldwell, should be followed by this Court because PEPCO was the prevailing rule prior to the 1972 Amendments to the Lonsghoremen's Act. ATLA members regularly practiced in the maritime field under the perception that courts would not cut off a longshoreman's right to sue after six months. Not until the District Court decisions which resulted in Caldwell in the Fourth Circuit and Rodriguez in the Second Circuit did ATLA members believe that injured longshoreman had only six months to sue. In view of the existence of the PEPCO rule at the time of the 1972 Amendments, it is doubtful that Congress had any idea that longshoremen would be held to a six months statute of limitations. Since Congress made no change in the prevailing rule in the comprehensive amendments it under took in 1972, this Court should presume that Congress was content with the PEPCO rule. This is all the more true since the LHWCA serves as the workmen's compensation statute for the District of Columbia. In fact, more workmen are covered in the District of Columbia than are covered as "pure longshoremen". Thus the previously accepted rule of the Court of Appeals for the District of Columbia Circuit in PEPCO should be changed by this Court only upon clear evidence of Congressional intent. The Congressional silence shown in the 1972 Amendments should be taken as acquiescence in the PEPCO rule.

2. WHERE THERE IS A CONFLICT OF INTEREST BETWEEN THE LONGSHOREMAN AND THE EMPLOYER, AND THE EMPLOYER FAILS TO SUE A NEGLIGENT THIRD PARTY, THE LONGSHOREMAN MAY BRING SUCH A SUIT IN HIS OWN NAME EVEN AFTER SIX MONTHS AFTER AN AWARD IN A COMPENSATION ORDER.

Where there is a conflict of interest between the employer and the longshoreman, the right to sue the negligent third party should be deemed to continue in the longshoreman. This Court's holding in Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1956) supports such a holding. There, the employer's compensation carrier was also the liability carrier for the third party to be sued. The result was that the longshoreman's right of action was held by the party most likely to suffer if the action was successfully prosecuted. This Honorable Court said:

"In giving the assignee exclusive control over the right of action, however, we think that the statute presupposes that the assignee interest will not be in conflict with those of the employee, and that through action of the assignee the employee will obtain his share of the proceeds of the right of action, if there is a recovery. Here, where there is such a conflict of interest, the inaction of the assignee operates to defeat the employee's interest in any possible recovery. Since an action by Travelers [the carrier] would, in effect, be an action against itself, Czaplicki [the longshoreman] is the only person with

sufficient adverse interest to bring suit. In this circumstance, we think the statute should be construed to allow Czaplicki to enforce, in his own name the rights of action that were his originally." 351 U.S. at 531.

The Third Circuit Court of Appeals in Johnson v. Sword Line, 240 F.2d 954 and 257 F.2d 541 (3rd Cir. 1957), extended the Czaplicki conflict of interests rule a step further. In its first opinion the Court said that "the statutory assignee or its insurance carrier may not be permitted to stand pouting in a corner like a sulky bar maid at a barn dance and simply refuse to bring suit without adequate reason." 240 F.2d at 956. The Court noted that is was obvious that it was Congressional intent that the statutory assignee should bring suit unless there was a good reason why it should not. Id. at 956-57. Therefore, the Court in its second opinion created a presumption that there was a conflict of interest and placed the burden of proof to the contrary upon the stevedore. Therefore, unless the stevedore proved the existence of no conflict, the longshoreman would be entitled to sue beyond the six month period.

Although the Longshoremen's Act was amended in 1959 by the language which created the six month time period within which the longshoreman could bring suit before an assignment would take place, this change in the statutory language has not altered the existence of the conflict of interest exception.

See Caldwell, supra; White v. United States, 507 F.2d 1101 (5th Cir. 1975); McClendon v. Charente Steamship Co., 348 F.2d 298 (5th Cir. 1965).

The question remains, however, of what a conflict of interest actually is. Where, as in Czaplicki, the same carrier represents the employer and the third party, the conflict of interest is clear. In addition, the courts have recognized that ordinarily a stevedore-employer will be reluctant to sue its business clients, the shipowners. See Valentino v. Rickners Rhederei G.M.B.H., 552 F.2d 446 (2d Cir. 1977). Since the longshoreman has the statutory right to receive eighty percent of the proceeds of any suit brought by the employer (after recovery of compensation payments and cost), the longshoreman's interest in pressing the suit can obviously conflict with the employer's interest in not antagonizing its business customer, the vessel owner. This Court should recognize that fact of business life and extend Czaplicki to protect longshoremen where the employer declines to sue. A rule recognizing a presumption of a conflict of interest as in Johnson v. Sword Line, supra, would seem appropriate. In such a situation, unless the employer could show no conflict of interest had precluded him from bringing suit, the longshoreman would be permitted to continue with the action.

In addition, to avoid the consequences of a "business decision" not to sue, this Court should recognize that the employer may "re-assign" its right

to sue back to the longshoreman. Such a reassignment has been recognized as acceptable by several lower courts. See Caldwell, supra, Johnson v. Sword Line, 257 F.2d at 546; The Owen, supra; Johnson v. Sword Line, 146 F.Supp. 940 (E. D. Pa. 1956); Magee v. McNany, 10 F.R.D. 5 (W.D. Pa. 1950). This Court should also recognize that an employer, for business interest or any other reason, may waive its assignment and permit the longshoreman to prosecute any third party action. Waiver of the statutory protection for the employer has been recognized by the lower courts. See PEPCO, supra; Jay v. Chicago Bridge and Iron Company, 150 F.2d 247 (10th Cir. 1945). These procedures would permit an employer to return the right of action to the longshoreman-employee, for such proceedings as the employee may want to undertake. Such a procedure would also recognize that the ordinary employer may wish, for business reasons, not to participate in litigation against his client and customer, the vessel owner. Yet it preserves the right of action for the employee, if he wishes to proceed.

3. THERE IS NO "AWARD IN A COMPENSATION ORDER FILED BY THE DEPUTY COMMISSIONER OR BOARD" SO AS TO TRIGGER THE ASSIGNMENT PROVISION OF 33 U.S.C. §933(b) BY THE MERE ACCEPTANCE OF COMPENSATION WITHOUT ACTION BY THE DEPUTY COMMISSIONER.

The term "Award in a Compensation Order" has a definite meaning under

the Longshoremen's Act. If there is no controversion by the employer then compensation under the Act is paid "without an award" by the employer. 33 U.S.C. §914(a), (e). In the event that an employee's right to compensation under the act is controverted by the employer, 33 U.S.C. §919 details the procedures for filing a claim with the Deputy Commissioner and a resolution of the claim before the Deputy Commissioner or an Administrative Law Judge, under the 1972 Amendments. It is only at this stage that an order making an award is entered. 33 U.S.C. §919 (c), (d), and (e).

After the 1938 Amendments to the Act, acceptance of compensation under an award in a compensation order filed by the Deputy Commissioner operated as an assignment to employer of the employee's claim against a third party. The courts were therefore called upon to determine what was "an award in a compensation order filed by the Deputy Commissioner" so as to effect an assignment of the third party claim. This Honorable Court in the case of American Stevedores v. Porello, 330 U.S. 446 (1947), said that where there was no award, mere acceptance of compensation payments itself did not preclude suit against a third party. Similarly, in the case of Grasso v. Lorentzen, 149 F.2d 127 (2d Cir. 1945), cert. denied 326 U.S. 743 (1946), the court said that the language and the legislative history of the 1938 Amendment showed that it intended to make the assignment provision effective only when compensation was accepted in accordance with

such an award. The court concluded that there must be some official action by the Deputy Commissioner establishing an award of compensation in order to make acceptance an assignment of the employee's cause of action against a third party. The Second Circuit concluded that although the award may be informal, it must amount to an award by the Deputy Commissioner. 149 F.2d at 129.

Several courts were faced with the question of whether compensation had been accepted under an award so as to effect an assignment of the third party claim. In Sessa v. Weeks Stevedoring, 56 F.Supp. 50 (S.D.N.Y. 143), the Court held that a memorandum of conference by a claim's examiner did not constitute an award, so there was no assignment. In Iaria v. Silver Line, Ltd., 56 F.Supp. 42 (S.D.N.Y. 1943), where the longshoreman never had a formal hearing or accepted compensation payments under a formal award by a Deputy Commissioner, the longshoreman was not precluded from suit. In Roeben v. United States, supra, the court noted that an award must be in the form of a compensation order, filed by the Deputy Commissioner himself, not by a mere underling. The Court said that Congress had made clear beyond doubt its intent that until such condition occurred, there was no divesting of the employee's right to sue. 113 F.Supp at 735. In accord Brusich v. Grace Line Inc., 56 F.Supp. 48 (S.D.N.Y. 1944).

The same reasoning was applied by the Court in Sea Quest Marine Inc. v. Cove Shipping Inc., 474 F.Supp. 164 (W.D. Wash. 1979), in which the Court concluded that a memorandum of informal conference in which the claim's examiner recommended continuing payment of compensation pending a second medical examination was not an award so as to trigger the assignment under §933(b). This Court should recognize the long series of cases dating back to this Court's 1947 decision in American Stevedores v. Porello, that unless the Deputy Commissioner enters an award of compensation, mere receipt of compensation payment does not constitute an award. See also Neri v. Erie Railroad Company, 199 Misc. 374, 101 NYS 2d 133 (1950); Romano v. United States, 90 F.Supp. 15 (S.D.N.Y. 1950); Tevington v. International Milling Company, 622 F.Supp. 462 (W.D.N.Y 1945). Similarly, this Court should recognize the longstanding rule that an award requires action by the Deputy Commissioner himself, not by a mere underling. Where the Deputy Commissioner has not acted, there is no award which triggers the assignment provision of §933(b). Where an employee's right to sue a negligent third party is going to be cut off, this Court should require strict compliance with the clear language of Congress. It is only where an award is entered by a Deputy Commissioner that a longshoreman should expect an assignment of his cause of action. Where there has not been action by the Deputy Commissioner, the longshoreman would not expect his cause of action to be assigned. This Court should recognize

the reasonableness of such an expectation and should require that prior to any assignment there be clear action by the Deputy Commissioner.

CONCLUSION

For the reasons stated, this Court should permit longshoremen to maintain actions against negligent third parties even though an assignment may occur pursuant to §933(b) of the Longshoremen's Act. The Court should also recognize that conflict of interest for business reasons is sufficient to permit the longshoreman to maintain such a negligence action even after six months. The Court should also recognize that the employer may re-assign the cause of action to the longshoreman or otherwise waive the statutory assignment protection to permit the longshoreman to sue the third party. Finally, unless there is action by the Deputy Commissioner, there is no award so as to trigger the statutory assignment provision in the first place. Accordingly, the Court should conclude that the petitioners in the instant matters retain the right to sue the respective vessel owners for the personal injuries petitioners received. The decision of the Second Circuit Court of Appeals should be reversed and remanded so these matters can go forward for trial on the merits.

Respectfully submitted on behalf of the Association of Trial Lawyers of America, Harry M. Philo, President,

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